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Shirley Turnbaugh as personal representative of the estate of Leroy Turnbaugh v. Evan Anderson and Red Dome, Inc.: Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SHIRLEY TURNBAUGH, as Personal Representative of the Estate of LEROY TURNBAUGH, for the Benefit of the Heirs of LEROY TURNBAUGH,

Plaintiff-Appellant,

vs.

EVAN ANDERSON and RED DOME, INC., a Utah Corporation,

Defendants-Respondents.

Case No. 880501-CA

Priority #14b

BRIEF OF THE APPELLANT

Appeal from a Final Judgment of the
Fourth Judicial District Court of Millard County
The Honorable Ray M. Harding, presiding

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BRIEF OF APPELLANT

JURISDICTION

This Court has jurisdiction under 78-2a-3(2)(h), Utah Code Annotated 1953 as amended.

NATURE OF PROCEEDINGS

This appeal is taken from a final judgment entered by the Honorable Judge Ray Harding, Fourth Judicial District Court, relative to a wrongful death action against a non-operating mineral interest owner (Defendant Red Dome, Inc.), and the owner of a defective front-end loader (Defendant Evan Anderson) which the decedent was operating at the time of his death.

ISSUES PRESENTED FOR REVIEW

The following issues are presented for review in this appeal:

1. Is a non-operating mineral interest owner such as

Defendant Red Dome, Inc., subject to liability for statutory nuisance?

2. Was the question of nuisance properly addressed by the trial Court?

3. Did Defendant Evan Anderson have a duty to warn the operator of faulty machinery?

4. Does the Utah Fencing Statute (Utah Code Annotated, Section 40-5-1, 1953 as amended), apply to open-pit excavations such as the one into which the decedent fell?

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ETC.

The interpretation of Section 40-5-1, and Sections 76-10-801 and 76-10-803, Utah Code Annotated, 1953 as amended.

STATEMENT OF THE CASE

Proceedings Below

This wrongful death action was brought to recovery damages for the death of LeRoy Turnbaugh, who was killed when the front-end loader he was operating rolled into an 18 to 20 foot deep open-pit mining excavation. Plaintiff's claims were based upon (1) Defendant Red Dome's conduct in contributing to, and supporting, a nuisance; (2) Defendant Red Dome's violation of Section 40-5-1, Utah Code Annotated, 1953 as amended (the Utah Fencing Statute); and (3) Negligence on the part of Defendant Evan Anderson in failing to warn the lessee of the equipment as to the machine's potentially lethal mechanical problems (R.1-4).

In defense of the foregoing claims, Defendant Red Dome denied the nuisance allegations, and claimed that even assuming the

existence of a nuisance, Plaintiff's claims were barred by the doctrines of comparative negligence and assumption of the risk (R.5-9). Defendant Red Dome, Inc. further maintained that as a mere non-operating mineral interest owner who received $55,000.00 a year as a completely unconnected and sterilized onlooker, said Defendant owed no duty to LeRoy Turnbaugh and was therefore exempt from the statutory nuisance provisions. Relative to the claims based on the Utah Fencing Statute, Defendant Red Dome simply took the position that the statute did not apply to open-pit excavations such as the one into which the decedent fell. Defendant Anderson's defense was based upon comparative negligence, assumption of the risk, and the alleged absence of any duty as between said Defendant and the decedent.

The Defendants moved for Summary Judgment (R.25-28), which Motion was denied (R.93).

The case was set for a bench trial before the Honorable Ray Harding. At the close of trial, Plaintiff moved to amend its Complaint to allege the maintenance of a nuisance by Defendant Anderson, pursuant to Rule 15 Utah Rules of Civil Procedure, which Motion was denied (Tr.217-218).

The Court ruled in favor of both Defendants finding no cause of action on the part of the Plaintiff (R.164-166). More specifically, the Court concluded that Defendant Red Dome, Inc. did not create a nuisance, that Defendant Red Dome, Inc. had no duty toward the decedent by virtue of Red Dome's status as a non-operational mineral interest owner, and that the Utah Fencing

Statute does not apply to open-pit excavations such as the one at issue. As to Defendant Anderson, the trial Court found that he was not negligent. In the trial Court's Memorandum Decision, it did not address the issue of whether or not the scene of the accident constituted a nuisance, and if so, whether Defendant Red Dome, Inc. as owner of the hazardous mining claims, aided in creating, or contributed to the nuisance, or supported, continued, or retained the nuisance, as specified in the Utah Nuisance Statute (R.164, 166).

STATEMENT OF FACTS

On July 6, 1983, LeRoy Turnbaugh, a resident of Fillmore, Utah, was killed when the front-end loader he was operating rolled backwards into an open-pit excavation situated on a mining claim owned by Defendant Red Dome, Inc. (Tr.10,11). The loader had been leased by Defendant Evan Anderson to the decedent's employer (Tr.109, 129). There was no fuel gauge on the loader (Tr.24), and the loader apparently ran out of fuel (Tr.23), thereby rendering the brakes and the steering of the loader inoperable (Tr.91). The loader rolled backwards (Tr.28) over the vertical edge of a mining pit which was 18 to 20 feet deep (Tr.29). The decedent was crushed under the loader.

Defendant Evan Anderson did not inform Don Peterson of the fact that when the engine stopped on the loader which killed LeRoy Turnbaugh, that, in that event, the steering was not operable nor were the brakes (Tr.26). This is of great importance in that there was no fuel gauge on this particular machine, and if the machine

were to run out of fuel the steering and the brakes became inoperable when the engine died. Don Peterson rode with the decedent the day before the accident in a loader which was not the same as the loader which killed LeRoy Turnbaugh (Tr.117), although testimony was that except in size they were similar. Evan Anderson testified that he did not indicate to decedent LeRoy Turnbaugh nor Don Peterson, decedent's employer, that there was no fuel gauge on the subject loader nor that when the subject loader ran out of fuel the engine died, thus rendering the steering and braking of the machine inoperable (Tr.113).

Defendant Red Dome, Inc. had an operating agreement with the Sorenson Brothers whereby the Sorensons operated the mining operation of the property owned by Defendant Red Dome, Inc. and paid to Red Dome, Inc. a royalty which in the year 1983 amounted to $55,000.00 (Tr.143).

Mr. Gordon Griffen, the only employee, chief operating officer and sole stockholder of Red Dome, Inc. (Tr.131, 132), testified that the area containing the mining claims was extremely rough, dangerous and could constitute a hazard (Tr.135, 141); however, it was of no concern to Red Dome, Inc. (Tr.137, 138).

The mining claim where the accident occurred was pock-marked with pits such as the one in which the decedent was killed (Tr.19), yet said mining claims were entirely devoid of berms, fences, warning signs, or other safety measures (Tr.31-33, 132, 136-140, 155-156) to minimize the danger of falling into the hazardous open-

pit excavations, some of which were within five or six feet off of a public roadway.

SUMMARY OF ARGUMENT

1. The nuisance statutes of Utah as set out under Section 76-10-801 and 76-10-803, Utah Code Annotated 1953 as amended, apply to a "mere owner" of real property such as mining property even when the said owner is not the operator of the mining property.

2. If the appellate Court finds that a "mere owner" of property, on which there exists a nuisance, can be held liable for damage incurred because of such nuisance, then, and in that event, this matter should be remanded to the Trial Court for a determination of whether or not a nuisance existed in the subject case. The Trial Court did not rule on the question of whether or not there was a nuisance. The Trial Court in its Memorandum Decision treated the nuisance as if it were negligence referring to "standard of reasonable care" and "duty toward" the Plaintiff who "at the most was upon the property as a licensee."

3. The Trial Court erred in failing to find that Defendant Evan Anderson had a duty to warn the operator or the lessee of his machinery that the machinery had a dangerous proclivity which was inherent and hidden to the uninitiated.

4. The Trial Court erred in stating that Section 40-5-1 of the Utah Code Annotated 1953 as amended, the Utah Fencing Statute, "does not apply to open-pit excavations, such as the one at issue herein, that are relatively shallow and conspicuous to the reasonably prudent person."

ARGUMENT

I

A NON-OPERATING MINERAL INTEREST OWNER SUCH AS DEFENDANT-RESPONDENT RED DOME, INC., IS SUBJECT TO LIABILITY FOR STATUTORY NUISANCE IN UTAH.

The Trial Court in its Memorandum Decision, (R. 165) cites the case of Ellertson v. Dansie, 576 P.2d 867 (Utah 1978) in support of its conclusion that "where there is a dangerous condition on one's property which is just as observable to an invitee as to the owner, the owner has no duty to warn or to protect the invitee except to observe the universal standard of reasonable care under the circumstances." The Ellertson case involved a landowner who had done a rather shoddy job of tying his horse up to a post. The tether slipped down to the base of the post and the horse became entangled. The landowner asked a passerby to assist him in untangling the horse. In the process of trying to untangle the horse, it reared and struck the invitee, who then filed an action against the landowner. These facts are a far cry from those set forth herein, and in fact do not indicate the maintenance of a nuisance. The Ellertson action was based upon claims of negligence, a breach of duty to exercise ordinary care.

The trial judge seems to say herein that the Utah nuisance statute does not apply because Defendant Red Dome, Inc. owed no duty to decedent. That logic seems to ignore the obvious, namely, that the statute created the duty because in common law there is no duty.

The Trial Court cited two Oregon cases, Catale v. Vanport Manufacturing, Inc., 738 P.2d 599 (Oregon App. 1987) and Ashland v. Pacific Power and Light Company, 395 P.2d 420 (Oregon 1964), which cases held that owners who do not retain any right to control the property, exercise any control over their property, could not be held liable for the death of a child in a pond built by an owner's employee who resided on owner's property. The Trial Court states in its decision herein, (R. 166),

> "The analogous situation existed here where the owner Red Dome, Inc. only collected royalties from those that mined the minerals and had no control whatsoever over their operations. Red Dome, Inc. cannot therefore be held to answer for any alleged negligence or nuisance created by any of the successive mining companies that worked upon his land."

Nuisance is defined at Section 76-10-801, Utah Code Annotated 1953 as amended, as follows:

> (1) A nuisance is any item, thing, manner, condition whatsoever that is dangerous to human life or health or renders soil, air, water, or food impure or unwholesome.
>
> (2) Any person whether as owner, agent, or occupant who creates, aids in creating, or contributes to a nuisance, or who supports, continues, or retains a nuisance, is guilty of a Class B misdemeanor. (Emphasis added.)

Mr. Gordon Griffen, the sole stockholder of Defendant-Respondent Red Dome, Inc., (Tr. 132) knew that there was no fencing, no barriers, no signs indicating danger, nor berms around the lips of the pit in the mining area (Tr. 138), that he visited the area, "probably an average of three times a year," (Tr. 135) and responded to a question, "You generally recognize the area of the mining claims as being potentially very hazardous, don't you?" (Tr. 141) as follows:

Answer: If one were to go out there by themselves or walk across the area in our claims and outside our claims and you happen to trip and fall, I think you would be in trouble. If you couldn't get out by yourself, the heat would get you one day or the cold get you in the night. I don't think that you could -- I don't think there is a place there that you could easily get to and jump off and hurt yourself. I will say maybe you might be able to find a place but on the flat generally no.

Question: There are as Mr. Anderson admitted several hundred large pits there.

Answer: Depends on what you mean by large of course.

Then at Tr. 142 counsel showed Mr. Griffen Defendants' Exhibit 14 and asked,

"Is that typical however of the size of the pits, several hundred pits, that were in existence out there?

Answer: Well, some would be bigger, some would be bigger.

Mr. Griffen stated that from the first of June 1983 through the 30th of May (presumably in 1984) his royalty from the operation of the mine amounted to $55,000.00, (Tr. 143).

Mr. Griffen stated, (Tr. 137) that he had licensed the mining operation to people who "would operate in a safe and proper manner." The safety and operation then became the sole responsibility of the people who were mining the property, according to Mr. Griffen. Mr. Griffen stated that he left the whole question up to the mining operators and the government inspectors who were trained in the area of safety.

When asked, (Tr. 136)

"Did you in that regard ever establish or seek to establish the maintenance of berms or barriers along the highways or around any of the open pits?

Answer: No. That was outside my jurisdiction."

The whole of the testimony of Mr. Griffen followed the line that indeed the area was one which could be considered dangerous but that Defendant-Respondent Red Dome, Inc. had "no right" to impose itself upon the licensee mining operator in the field of safe operation.

As a matter of fact, the Trial Court ignored the testimony by Mr. Griffen to the effect that the operation of the mine "in a safe and proper manner" was involved in the licensing agreement between Defendant-Respondent Red Dome, Inc. and the mining operators (Tr. 137). Therefore, although the control of the licensee on the question of safety was not set out item by item, apparently it did exist and the Trial Court was in error to state that Defendant-Respondent Red Dome, Inc. "had no control whatsoever over their operation." Defendant-Respondent Red Dome, Inc. really can't be bothered with such boring details, but it is submitted that $55,000.00 per year is sufficient to go to a modicum of trouble, especially when so ordered by statute.

Utah is a mining state and therefor this Court should give careful consideration to the balancing of the equities between the mining interests and the rights of the public to a certain amount of precautions on the part of mining operators and owners. This is especially true where the proximity of a public highway to danger appears to be in some cases five or six feet, (R.163, Ex. 8, 17, 28).

II

THE TRIAL COURT ERRED IN NOT MAKING A FINDING AS TO WHETHER OR NOT A NUISANCE EXISTED IN THE SUBJECT CASE.

The Trial Court did not make a finding as to whether or not the situation involving the dangerous pits on the 650 acres of land (Tr. 134) did or did not constitute a nuisance but only addressed the question of whether or not a nonoperating owner had a duty to an invitee.

In the 1982 case of Radloff vs. State, 323 NW 2d 541, Mich. App., the owner of lands leased the lands to a company, which company dug a gravel pit which was later filled with water. The Court found that the evidence indicated that the State (owner) knew that the gravel pit was unsafe for public use but made no effort to discourage its use by the public or to contour the embankment to make the area safe. The Court found that there was an intentional nuisance created and the Court quoted from the case of Denny vs. Garavaglia, 52 NW 2d 521, (Mich. 1952), where the Court stated that "an intentional nuisance means not that the existence of a nuisance was intended by the creator but, rather, that the creator intended to bring about the conditions which are in fact found to be a nuisance."

In 1978 the Utah Supreme Court in the case of Vincent v. Salt Lake County, 583 P.2d 105 found that the following instructions to the jury given by the Trial Court was a correct statement of the law regarding the intentional creation or maintenance of a private nuisance,

> "A nuisance is a condition, not an act or failure to act on the part of the person responsible for the condition. If the wrongful condition exists, and the person charged therewith is responsible for damages to others, although he may have used the highest possible degree of care to prevent or minimize the deleterious effects. Recovery in an action for a nuisance cannot be defeated by showing that there was no negligence on the part of the defendant.
>
> A nuisance does not rest on the degree of care used, for that presents a question of negligence, but on the degree of danger existing even with the best of care, the question of care or one of care is not involved. Thus, a person who creates or maintains a nuisance is liable for the resulting injury to others, without regard to the degree of care of skill exercised by him to avoid the injury, and notwithstanding that he exercises reasonable or ordinary care and skill, or even the highest possible degree of care."

Thus it can be seen that the Trial Court herein applied only the legal concepts surrounding the law of negligence such as standard of care, status of plaintiff (licensee, invitee, trespasser, etc.), assumption of the risk, etc.

The Trial Court seems to be under the impression that the absence of a duty on the part of Defendant-Respondent Red Dome, and/or the presence of assumption of the risk or contributory negligence on the part of Mr. Turnbaugh, is somehow fatal to a cause of action based upon statutory nuisance. While this was precisely the position taken by counsel for Defendant-Respondent Red Dome in his Closing Argument (Tr.220), such notions are contrary to current Utah law. Further, it is well established under Utah law, that contributory negligence is not a defense to a nuisance action, Branch v. Western Petroleum, Inc., 657 P.2d 267, 276 (Ut. 1982). (See also discussion at R.58 herein.)

The Trial Court did not even address the issue of whether or not the conditions created on the land by licensees and supported,

continued and retained by Defendant-Respondent Red Dome, Inc. did in fact constitute a nuisance. The subject case should be remanded to the Trial Court for ascertainment of this fact.

III

THE TRIAL COURT ERRED IN FINDING THAT THERE WAS NO EVIDENCE THAT THE FRONTEND LOADER OPERATED BY THE DECEDENT WAS DEFECTIVE OR WAS IMPROPERLY MAINTAINED.

Testimony of Defendant-Respondent Anderson, the owner of the machine which decedent was operating at the time of his death, was to the effect that the machine was properly maintained by said Defendant. In contrast, the testimony of witness Michael James Haveron, an ex-employee of Defendant-Respondent Anderson, indicated that the so-called maintenance was minimal, to the say the least (Tr. 97).

> Question: Can you give us a general description of the general condition of the loaders that were being utilized by Fillmore Products during the time that you were there?
>
> Answer: The one that I ran was in pretty poor shape. We didn't have the money to take care of all the maintenance items that it needed.
>
> Question: Was Mr. Evan Anderson aware of the problems with the loaders?
>
> Answer: Yes ---
>
> Question: When you say there were problems with the loader you were using but didn't have the money, what types of problems were there?
>
> Answer: There were a lot of hydraulic leaks there common with them. We had a pretty big leak with the steering system, (Tr. 98).

Again, the same witness under cross examination by Defendant-Respondent's counsel at Tr. 102 at Line 11:

> Question: Was it your job also to supervise the

maintenance of the equipment?

Answer: Yes.

Question: Then was there a lot of maintenance done on the equipment?

Answer: We did a fair amount. Not everything we needed to do because there wasn't enough funds.

Question: There wasn't any maintenance done? There was maintenance done on the loaders?

Answer: When it came to a shutdown point we do maintenance. When the machine would not operate we would fix whatever was wrong.

And again at Tr. 103 on cross examination:

Question: And what about the operation of just basically checking the operation of steering and brakes and so forth, whose duty was that to report any problems?

Answer: They would be reported to me and I would talk to Evan about it.

Question: Who would report to you?

Answer: The operator, which at the time was Richard Scott. It was common knowledge with us all that we had a problem with the steering and brakes. The brakes commonly---

Question: Say that again.

Answer: The steering we knew we had a problem with that because it would veer from side to side if you weren't accustomed to the play that was in the system and the brakes would go out.

However, regardless of whether or not the maintenance was of a high degree, there was an inherent danger with the subject loader in that if it ran out of fuel, the engine would stop. If the engine stopped, the brakes would cease to work and the steering would cease to work (Tr. 25-256). It was testified by Mr. Anderson that the characteristic of the steering failing to work when the engine quit

was a characteristic of its manufacture, (Tr. 39) and under cross-examination at Tr. 40 when asked,

> So when the engine quit and you had no hydraulic pressure then you could not steer?
>
> Answer: That is correct.

Not only did Mr. Anderson know about these two inherently dangerous characteristics of the particular machine but he did not point them out to Mr. Don Peterson to whom he was "loaning" his machinery. Here it will be noted that Mr. Peterson testified that he was allowing Mr. Anderson credit for the money that Mr. Anderson owed him for the use of his loader. On direct examination he testified at Tr. 109:

> Question: I see. In other words you recall in your deposition testifying that you were paying Evan Anderson $15 to $20 a load, you couldn't remember?
>
> Answer: Yes, this has been a policy for a long time. I have used his loader off and on for four, five or six years, the amount of time he was down there. Whenever he did that I just put it on his account.
>
> Question: Instead of actually paying him money, you were deducting what he owed you?
>
> Answer: Right.

Mr. Anderson not only knew of the above set forth inherently dangerous characteristics of the machine, but he did not warn Mr. Peterson of the fact.

> Question: Now did you at any time prior to the accident advise Don Peterson of the fact that this loader would lose its braking capabilities and steering capabilities in the event that the motor stopped running?
>
> Answer: I don't remember that conversation if in fact it took place, but, you know, as I say, I had that loader for a couple of years before that and Don had used it several times. Just a specific conversation as to me telling him the brakes

> didn't work after the engine stopped or the steering didn't work, I don't remember having that conversation. But Don was an experienced operator. Maybe I didn't feel like I had to. (Tr. 26-27).

There was conflicting testimony as to the maintenance, whether good or bad, of Defendant Anderson's equipment and as regards the credibility of the witnesses, Defendant Anderson was testifying in his own behalf whereas the witness Haveron was in no way connected to the Plaintiff or the Defendants and as far as could be ascertained was a completely unbiased witness. It is submitted that the Trial Court's finding of proper maintenance flew directly in the face of the evidence.

Regardless of the maintenance of the loader, the Defendant-Respondent Anderson was under a duty as a bailor for hire to warn the bailee of any inherent defects in the equipment bailed, especially when the defects were so crucial to the safe operation of the said machine, to-wit brakes and steering. This of course was of much larger importance when taken together with the lack of a fuel gauge (Tr. 24), meaning that the operator had to stand up to look into the overhead opening of the fuel tank to guess if there were or were not fuel contained in the said tank. It is submitted that an operator could be busy at all times of the operation and could not quickly and accurately check the amount of fuel in the tank at a given time.

The neglect of installing a new fuel gauge, coupled with the failure to warn either Peterson or decedent of the inherent dangers of the particular loader, constituted culpable negligence on the part of Defendant-Respondent Anderson.

IV

THE UTAH FENCING STATUTE, (40-5-1), SHOULD APPLY TO OWNERS OF LAND ON WHICH THERE IS AN OPEN-PIT TYPE EXCAVATION.

The scope of the Utah Fencing Statute, Utah Code Annotated Section 40-5-1, appears to be an issue of first impression in Utah. Since the Statute became law in 1898, it appears to have been cited in only one reported Court Opinion, entitled Ewell vs. The United States, 579 Fed. Supp. 1291 (C.D. Utah, 1984). The Court in that case never reached the issue of the scope of the Utah Fencing Statute because the Court found that the Defendants therein were immune from liability in any event by virtue of the Utah Landowners Liability Act, which shields landowners from liability for recreational landusers' injuries sustained on the landowners' property.

In the case at bar the Trial Court concluded that the Utah Fencing Statute did not apply to open-pit excavations such as the one in which the appellant's deceased husband fell. (R. 165)

The Trial Court in its Memorandum Decision stated that the Ochampaugh vs. City, 588 P.2d 1351 (Wash. 1979) was highly "persuasive and cogent in view of the facts set forth in trial in this matter." (R. 164) The facts in that case were that two young boys drowned in a pond that had been formed many years prior by the filling up of an excavation. The Court held that such an excavation filled with water was not an "excavation" within meaning of statute requiring persons digging, sinking or excavating any "shaft, excavation or hole" to fence it so as to securely guard the danger to persons and animals falling into such shafts or excavations.

The Trial Court herein stated that the same case, to-wit, Ochampaugh vs. City, cited an earlier precedent that held that the Washington statute applied only to excavations, "the area of which on the surface is relatively small and which can be fenced without great expense." The actual quote that the Trial Court was referring to was from McDermott vs. Kaczmarek, 2 Wash. App. 643, 469 P.2d 191 (1970). The actual quote from this case was "that it was meant (the Washington fencing statute) to apply only to excavations of the pit type, the area of which on the surface is relatively small and which can be fenced without great expense. Nothing was said about "relatively shallow and conspicuous to the reasonably prudent person" as was said by the Trial Court herein.

The writer has not been able to find a case where a fencing statute has been held to apply in mining states to an excavation that is filled with water as in the Ochampaugh case or a ditch containing water as the Court in Ochampaugh cites the case of Barnhart vs. Chicago M & St. Paul R.R., 89 Wash. 304, 154 P.441, a 1916 case.

This is a case of first impression in Utah, as stated supra, but here we do not have a body of water, a mine shaft that had a door on it where a boy enters voluntarily; the bad air inside kills the boy. Nor is the subject case a large pit that would be completely unreasonable to fence, such as Bingham Canyon excavation for Kennecott Copper mine. Here we have a relatively short space that could be fenced from 90-degree angles from the highway a relatively short distance on each side, or as a matter of fact, each excavation could be quickly fenced as it was finished, or in the bare minimum,

berms could be pushed up to at least two vertical feet surrounding each excavation, making it quite a deterrent to rolling into the open pit. If a person or animal were walking in this area at night without a light, there is no question that the absence of a broken leg in a 10-minute walk would be nothing short of a miracle.

The statute says, "The owner, lessee or agent of any mine who by working such mine has caused, or may hereafter cause, the surface of the public domain, or of any highway, or other lands, to cave in and form a pit or sink into which persons or animals are likely to fall shall cause such pit or sink to be filled up, or to be securely enclosed with a substantial fence at least four and one-half feet high;...." Here again statute has created a duty where none existed at common law.

It is submitted that it would take more than a strict construction of the statute to seriously contend that a cave-in appearing on the surface of land caused by underground mining which "formed a pit or sink into which persons or animals are likely to fall" to be different in legal construction from a mining statute designed to protect unwary people and animals where the pit or sink was formed by miners working from the surface down.

CONCLUSION

Regardless of whether or not the frontend loader was properly maintained is not dispositive as to the negligence of Defendant-Respondent Anderson in not apprising Don Peterson or his operator of the inherent dangers in the machine that he was renting to them.

These dangers were well known to him, and he merely thought that Mr. Peterson would know of them, without telling him, of course.

The Trial Court should be reversed on this holding.

The facts surrounding the ownership and operation of the subject mining claim are that a one-man corporation has been paid $55,000.00 a year for a license to mine the said property. The owner of this land, or to be more precise, the sole employee, chief executive officer and only stockholder of the corporation that is the owner of this land shrugs off any concern he should have regarding the safety of the open-pit mine operation on his land in a totally cavalier fashion.

The Trial Court is totally convinced that even if there were a nuisance, a mere owner and nonoperator of the land would not be liable for any damages flowing from a nuisance on the land if indeed the nuisance did exist.

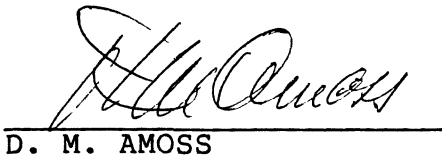
Plaintiff-Appellant submits that it was clear error as a matter of law for the Trial Court to substitute a "control test" taken from Oregon case law in the place of the clear language of the statutory nuisance test in Section 76-10-801, Utah Code Annotated 1953 as amended, upon which Plaintiff-Appellant has relied since the inception of this action. For this reason, this case should be remanded with instructions for the Trial Court to determine whether Defendant-Respondent Red Dome, Inc. aided in creating, contributed to, supported, continued or retained a nuisance in violation of statute.

An owner, especially one who is cognizant of the danger surrounding the mining operation, is liable to the public and to an invitee for damage resulting from the maintenance of a nuisance, 76-10-801, supra, and Vincent v. Salt Lake County, supra.

Although the fencing statute as set forth in 40-5-1 has been around many years, this case is a case of first impression in Utah and should stand for the proposition that the person or persons who take treasure from the earth should maintain their operation in a manner that does not construct "traps for the unwary" or in fact 20-foot holes that have perpendicular sides and no indication of any kind at the lip of such a pit.

The case should be reversed and remanded for a hearing as to the question of damages.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, D. M. Amoss, attorney for Plaintiff-Appellant in the above Appeal, certify that on October 27, 1988, four copies of the within brief were served upon Defendant-Respondent by mailing them, first-class, postage prepaid, addressed as follows:

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